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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 13 Original

STATE OF CALIFORNIA,
*Complainant,*
vs.
MURRAY W. LATIMER, JAMES A. DAILEY and LEE M. EDDY, individually and as members of the Railroad Retirement Board, and GUY T. HELVERING, individually and as Commissioner of Internal Revenue,
*Defendants.*

## MOTION FOR LEAVE TO FILE AND BRIEF OF COMPLAINANT STATE OF CALIFORNIA IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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On April 4, 1938, complainant above named filed herein its motion for leave to file bill of complaint, together with notice of hearing of such motion. With the motion and notice there was presented to the court the bill of complaint which is the subject of the motion.

On April 11, 1938, the court issued its rule for the defendants to show cause, returnable on or be-

fore April 25, 1938, why permission to file the bill should not be granted.

The defendants on April 25, 1938, filed their response to the rule to show cause, in which response they asked leave to file their accompanying brief, and this brief was filed.

As complainant has heretofore filed a very short brief, expressed in general terms, with its motion for leave to file bill of complaint, the accompanying brief in support of said motion and in reply to the brief of defendants is herewith presented to the court and complainant asks leave to file the same.

## QUESTIONS PRESENTED

On pages 3 and 4 of their brief defendants state the questions which, according to their view, are presented on the motion of complainant. These questions are stated as follows:

> "1. Whether the Collector of Internal Revenue for the First District of California and the employees of the State Belt Railroad are indispensable parties in whose absence the court should not proceed.
>
> 2. Whether to join the Collector of Internal Revenue for the First District of California, a California citizen, would deprive this court of original jurisdiction.
>
> 3. Whether to join the employees of the State Belt Railroad, some of whom are citizens of California, would deprive this court of original jurisdiction.

4. Whether the bill of complaint alleges facts to show that the complainant will suffer irreparable injury from any action taken or threatened by the defendants.

5. Whether complainant has an adequate legal remedy through the payment of the taxes accrued under the Carriers Taxing Act of 1937, followed by a suit for refund.

6. Whether this suit is prohibited by section 3224 of the Revised Statutes.

7. Whether the United States is an indispensable party which can not be joined because it has not consented to be sued.

8. Whether this court should deny leave to file the bill of complaint for the reason that all of the issues which it presents have been decided adversely to the complainant by previous decisions of this court."

The argument of defendants contained on pages 14 to 50 of their brief follows, in general, the same order as the questions above stated. We shall answer such arguments in the order in which they have been presented by defendants.

## STATEMENT OF FACTS

On pages 4 to 9 of their brief defendants have given a statement in the form of a resume of the facts as alleged in the bill of complaint. This statement, in the main, sufficiently calls the attention of the court to the pertinent facts of the case. There is, however, one important omission to which we now direct the court's attention.

In Paragraph IV, page 13 of the complaint, there is the following allegation:

> "Said State Belt Railroad is an essential and indispensable facility of the San Francisco Harbor, administered by the State of California by and through the Board of State Harbor Commissioners of San Francisco Harbor, and said state in the construction, maintenance, operation, management and control of said State Belt Railroad is engaged in a usual, traditional and essential governmental function."

This allegation is the kernel of complainant's main contention that the Railroad Retirement Acts of 1935 and 1937 and the Carriers' Taxing Act of 1937 do not apply to the State of California, and an understanding of this contention is of vital importance in considering all of the jurisdictional questions which have been raised by defendants in their brief. We shall accordingly discuss this matter before answering the objections of defendants.

## I. THE STATE OF CALIFORNIA, COMPLAINANT HEREIN, IN THE CONSTRUCTION, MAINTENANCE, OPERATION, MANAGEMENT AND CONTROL OF THE STATE BELT RAILROAD, IS ENGAGED IN THE PERFORMANCE OF A USUAL, TRADITIONAL AND ESSENTIAL GOVERNMENTAL FUNCTION, AND AS SUCH IS IMMUNE FROM THE EXCISE TAX SOUGHT TO BE LEVIED PURSUANT TO THE CARRIERS' TAXING ACT OF 1937

### A. This Court, in Rogers vs. Graves, 299 U. S. 401, and Brush vs. Commissioner, 300 U. S. 352, has Adopted Three Major Tests in Determining Whether Any Particular Function of a Government Is Governmental or Proprietary. These Tests Are as Follows:

"(a) What were the public necessities which required state or federal action?

(b) Is the agency selected truly an instrumentality of government?

(c) To what extent have governments exercised the function?

We shall consider these questions in order, so far as they relate to the operation of the State Belt Railroad by complainant.

(a) Public necessity for the creation of the Board of State Harbor Commissioners for San Francisco Harbor, and the construction, maintenance and operation by said Board of the State Belt Railroad.

The State of California, through the Board of State Harbor Commissioners for San Francisco Harbor, exercises jurisdiction and control over a strip of water front land in the City and County of San Francisco bordering on tidewater in San Francisco Bay and of a certain part of the bay itself. Both the lands bordering the water and the adjacent lands submerged by the waters of the bay are integral parts of the harbor and their management and control by a single agency are necessary for the efficient and safe transportation of persons and property in and out of the City and County of San Francisco and the territory of the state tributary to said city and harbor.

These lands along the water front, from the time of the admission of the state into the union, have been sovereign lands of the state. The efficient operation of the harbor requires control over all of these lands under one agency in order that all of the facilities of the harbor may be integrated and the different activities thereof harmonized. Without such integration and unity of control the water front lands and harbor facilities could not be utilized so as to furnish the best possible service to the public at a fair price. Such unified control is also necessary in order that adequate facilities to accommodate the commerce of the port may be supplied when and as needed. The history of the port has shown the necessity for state ownership

and control and for the furnishing of credit by the state in order properly to develop the harbor.

Public control of the harbor is also required in order that the water front shall be properly policed and that regulations concerning the movement of vessels to and from piers and slips and along the water front shall be properly regulated. Such public control is also required in order that safe and proper landings may be constructed and that rules shall be made and enforced regarding the landing of goods and the conditions under which they may remain upon wharves.

In this connection it may be further stated that the efficient operation of the harbor has required the construction and maintenance of a street paralleling the bay along the entire water front and located on lands belonging to the state. Only a public agency would have the necessary power, including the power of eminent domain, to open and maintain such a street and regulate the traffic thereon.

The State Belt Railroad was constructed and is maintained and operated pursuant to the provisions of the Harbors and Navigation Code of said state (Statutes 1937, Chapter 368), annexed as Exhibit "C" to the bill of complaint herein. This railroad is an absolute necessity in the operation of the harbor. It consists essentially of a belt line running on the Embarcadero, state-owned property, parallel to the water front of San Francisco, and of spur tracks leading from said belt line on to each

of the forty-five or more piers under the control of the Board of State Harbor Commissioners and also connecting with the yards and tracks of interstate carriers by railroad, delivering to and receiving from said State Belt Railroad their cars containing merchandise coming into San Francisco and going out from San Francisco over their lines. The harbor could not operate without the State Belt Railroad, and a railroad of this kind is an integral and necessary part and facility of the Port of San Francisco.

(b) The Board of State Harbor Commissioners, in constructing, maintaining and operating the State Belt Railroad, is an instrumentality of the State of California engaged in the performance of a usual and traditional governmental function.

That the Board of State Harbor Commissioners is an instrumentality of the State of California is evident from the fact that the state has not seen fit to create any intervening political subdivision, authority or corporate body through which to effect its purposes with respect to San Francisco Harbor. The Board of State Harbor Commissioners is the State of California itself, operating through the state's directly appointed officers. Indicia of the status of the board as a state instrumentality are the following:

The board is required to render a biennial report to the Governor of the state; it has the power of appointment of officers and employees of the state; it has possession and control over the area of the

Port of San Francisco, owned by the state; officers and employees of the board are members of the State Civil Service System and of the Employees' Retirement System of the State of California; the revenues of the board must be deposited monthly in the state treasury and are subject to budgetary laws, and must be used pursuant to legislative appropriation; contracts of the board must be made in a manner prescribed by law; failure to comply with the rules of the board is a misdemeanor; bonded indebtedness for the work of the board is incurred through general obligation bonds of the State of California (Harbors and Navigation Code, Chapter 368, California Statutes 1937).

That the board is a state instrumentality engaged in performing governmental functions has been recognized in *United States* vs. *State of California,* 297 U. S. 175, 184; *Sherman* vs. *United States,* 282 U. S. 25, 29. In *Taylor* vs. *Spear,* 196 Cal. 709, 715 (238 Pac. 1038), the court referred to the board as "one of the state agencies of the State of California." See also *Denning* vs. *State,* 123 Cal. 316, 321 (55 Pac. 1000), on this point.

It was specifically held in *Platt* vs. *Commissioner,* 35 B. T. A. 472 (1937) that the Board of State Harbor Commissioners of California is engaged in the performance of a usual governmental function and that the salaries of the members of the board and its employees are immune from federal taxation.

A partial enumeration of the powers of a governmental nature exercised by the board are as follows: It has powers relating to landing and loading of merchandise; constructing wharves and improvements; making repairs; assigning berths and slips to vessels; building a sea wall and dredging; providing harbor police and making quarantine regulations; extending streets and establishing thoroughfares; exercising the power of eminent domain; providing a location for a public market; locating and constructing public dry docks; locating docks for federal use; operating a state belt railroad; providing a location for air ports; contracting for and using fire boats; removing obstructions to commerce and navigation; mapping water front changes; making rules and regulations for the commerce of the port.

In exercising its governmental activities the board has installed in excess of fifty navigation signals, including lights, sirens, and bells, while the federal government has installed only one, within the pier head line. The board has not only maintained a thoroughfare along the whole water front called the Embarcadero but has constructed a subway along and under the same for the improvement of traffic in front of the ferry depot, and has under statutory provision purchased property for the straightening of the lines of said street.

That the board is not acting in a proprietary capacity is shown by the statutory requirement (Section 3084, Harbors and Navigation Code) that

a greater amount of money shall not, in the main, be collected pursuant to the terms of said code than is necessary to enable the Board of State Harbor Commissioners to perform the duties required, exercise its authorized powers, and provide for interest and redemption requirements for bonds issued for any of the harbor purposes. This statutory policy has been followed continuously by the board.

This statutory restriction upon revenues is clearly designed in the interest of the public for the establishment of port charges as low as the operation of the harbor will permit and, in fact, has resulted in the establishment at said Harbor of San Francisco of exceedingly low port charges.

The State Belt Railroad is not a separate entity from the Board of State Harbor Commissioners. It has no separate corporate existence. It is merely one of the facilities constructed and operated by the board in the exercise of its governmental function of controlling, operating and managing San Francisco Harbor. The railroad is an absolute necessity in the operation of the harbor. Merchandise brought to the harbor by interstate carriers by railroad on the one hand, and vessels engaged in the coast-wide and foreign trade on the other hand, can not be transferred through the harbor without the use of such railroad. The railroad is therefore just as much a facility of the board as are the piers constructed and managed by the

board, and is just as much a facility as any mechanical device used in the handling of cargo coming into or going out of the port. The use of this railroad is so vital that it may be said with truth that without it the harbor could not function.

In Part VI, pages 46-50 of defendants' brief, an attempt is made to show that the state acting through the Board of State Harbor Commissioners is not exercising a usual and traditional governmental function in operating San Francisco Harbor and the State Belt Railroad.

In this connection it is stated that this court has held in *United States* vs. *California,* 297 U. S. 175, 186, citing *California Canneries Co.* vs. *Southern Pacific,* 51 I. C. C. 500, that the State of California, in operating the State Belt Railroad, is a carrier subject to Part I of the Interstate Commerce Act. This court has so held. It is submitted, however, that the cited case involved the application of a penalty upon the state for violation of the Federal Safety Appliance Act, a statute manifestly and solely having for its purpose the regulation of interstate commerce. No question of taxation was involved in the case. Indeed, at pages 184 and 185 this court drew a sharp distinction between the federal power to regulate commerce and the power to tax, asserting the plenary power of the United States as to the former, while admitting the immunity of state instrumentalities from the latter.

*Board of Trustees* vs. *United States,* 289 U. S. 48, is also cited as authority for the proposition that the proper criterion of the immunity of the State of California from the Carriers' Taxing Act of 1937 is its immunity as against the regulatory powers of congress rather than its immunity to ordinary taxation.

The obvious answer to this contention is twofold: (1) Congress enacted the Carriers' Taxing Act of 1937 pursuant to its taxing power, if pursuant to any power, under Article I, section 8, clause I of the federal constitution; (2) the Railroad Retirement Acts of 1935 and 1937 were not enacted pursuant to the power of Congress to regulate interstate commerce.

This court in *Retirement Board* vs. *Alton Railroad Co.,* 295 U. S. 330, 362, 374, definitely was of the opinion that the Railroad Retirement Act of 1934 (48 Stat. 1283) was not in purpose or effect a regulation of interstate commerce within the meaning of the constitution. We submit that the Railroad Retirement Acts of 1935 and 1937, by the same process of reasoning, are not regulations of interstate commerce within the meaning of the constitution.

We submit that the taxing features of the Carriers' Taxing Act of 1937, whether considered as one act along with the Retirement Acts or separately, can be justified, if at all, only as an exercise of the taxing power.

See

*Alton Railroad Co.* vs. *Railroad Retirement Board,* 16 Fed. Supp. 955, 956.

We note that the duties involved in the Board of Trustees case were, in this court's opinion, imposed in the exercise of the power to regulate foreign commerce (page 58). Further, that this court said:

> "The fact that the State in the performance of State functions may use imported articles does not mean that the importation is a function of the State government independent of federal powers. There is thus no violation of the principle which petitioner invokes, for there is no encroachment on the power of the State as none exists with respect to the subject over which the Federal power has been exerted." (Page 59.)

See

*United States* vs. *California,* 297 U. S. 175, 184.

Neither is *Helvering* vs. *Powers,* 293 U. S. 214, in point. The railroad in that case was a road which had been in private ownership. It was being operated by the state through trustees for the purpose of rehabilitating a private corporation. The operation of the railroad was rightly held not to be an exercise of a usual governmental function.

We can not see how *Willcuts* vs. *Bunn,* 282 U. S. 216, 225, is even remotely in point. There the tax was imposed, not upon a state, but upon a private individual who had invested in government bonds, and the tax was levied by reason of profits realized

from the sale of the bonds. This court considered that such a tax was not a direct burden upon a governmental instrumentality, and indeed, it is difficult to see how it could have been in any degree such a burden.

In the instant case the tax, if legal, must be paid directly by the state, out of moneys received from the operation of a state instrumentality. Such tax could not be paid in any other way (Harbors and Navigation Code, Section 1706).

Neither *Ohio* vs. *Helvering,* 292 U. S. 360, nor *South Carolina* vs. *United States,* 199 U. S. 437, is authority on the power of the federal government to collect taxes of the kind involved in this case. In both of those cases the taxes were imposed upon activities of the states which were traditionally and historically proprietary in character. There is a clear cut distinction between the activity of a state in engaging in the liquor business and the functioning of a state in the operation of a harbor facility.

(c) Governments have universally exercised the function of developing and operating their ports and harbors.

In *Commissioner* vs. *Ten Eyck,* 76 Fed. (2d) 515, the court reviewed the history of the construction and operation of ports and harbors in this country and in other countries and concluded that:

> "Port and harbor developments have long been regarded as governmental functions in providing for the welfare and prosperity of the people. * * * Historically, port activities have been

shown to be almost universally directly subject to the supervision of agencies of the government."

With respect to the operation of a railroad by the Albany Port District Commission, the court said in the same case:

> "It did operate the railroad, and charged rates authorized by the Interstate Commerce Commission. But we think that this terminal was intended as an instrument of government rather than of commerce only. In providing it and operating it, the state of New York was engaged in a usual governmental function as distinguished from a proprietary function."

In *Denning* vs. *State,* 123 Cal. 316, the Supreme Court of California said at pages 321 and 322:

> "The provisions of the constitution clearly show that the State has retained control of the harbor and frontages thereon for the use and benefit of the people, for the promotion of commerce and the general benefit of the body politic, and not as a mere business enterprise through which profits may accrue to the state treasury; and the statute creating the state board of harbor commissioners is intended and adapted to the execution of this purpose. It gives, it is true, various powers to that board, and imposes upon it various duties, some of them of a character which, under certain circumstances, may give a cause of action against the state. * * * But the powers and duties of the board are diversified. It has control of the bay and of the vessels

using it; keeping open passageways for the ferry boats; controlling the anchorage of vessels; removing vessels from the wharves and piers when unloaded, and the general care of all the property belonging to the State and connected with the wharves and piers, or used by said board. These duties are of a police character and purely governmental.

"The fact that the board is authorized or required to collect tolls and charges for dockage and wharfage to such extent 'as will enable the commissioners to discharge the duties required of them by the act' does not affect its character as a governmental agency."

This court in *Sherman* vs. *United States,* 282 U. S. 25, considered the capacity in which the State of California acts in operating the State Belt Railroad and expressed itself as follows:

"The matters complained of occurred upon what is known as the State Belt Railroad. The road is about five miles long, within the City of San Francisco, runs nearly parallel with the waterfront of the harbor, and connects many industrial plants and the line of the Southern Pacific Railroad Company with wharves belonging to the State and through the wharves with other common carriers engaged in interstate commerce by railroad. It may be assumed that the work done upon the Belt Line was interstate commerce. *But the line belongs to and is operated by the State; the work is done without profit for the purpose of facilitating the commerce of the port, and the funds received after*

*paying expenses go to the Treasury of the State to the credit of the San Francisco Harbor Improvement Fund. California has not gone into business generally as a common carrier but simply has constructed the Belt Line as an incident of its control of the harbor—a State prerogative.*" (Italics ours.)

Authorities might be multiplied to show that the construction, maintenance, and operation of harbors, including the usual facilities appurtenant thereto, have universally been considered governmental functions.

### B. The State of California Owning and Operating the State Belt Railroad Is the Carrier

It is sufficient in this regard to state that it was decided in *Sherman* vs. *United States,* 282 U. S. 25, and in *United States* vs. *California,* 297 U. S. 175, that in the operation of the State Belt Railroad the state itself is the carrier.

### C. The State of California, in the Operation of the State Belt Railroad, Is Immune From the Excise Tax Sought to Be Levied Upon the State Pursuant to the Carrier's Taxing Act of 1937

We have hereinabove shown that in the construction, maintenance and operation of the State Belt Railroad the State of California is engaged

in the performance of a usual, traditional and essential governmental function.

The doctrine that the activity of a state while so functioning can not be taxed is so firmly established that we shall not burden the court with a citation of other than the leading cases upon this point. The earliest and the leading cases upon this subject are *McCulloch* vs. *Maryland,* 4 Wheat. 316 (1819), and *Collector* vs. *Day,* 11 Wall. 113. The doctrine of these cases has been followed in numberless decisions of the Supreme Court of the United States, and the various federal and state courts.

It is also settled that the doctrine of immunity is necessarily reciprocal as between the federal government and the various state governments.

*Collector* vs. *Day, supra.*

We assume that there is no controversy in this case as to these fundamental doctrines, and we shall not further discuss them.

In conclusion on this point, we submit that complainant's case is entirely meritorious and is supported by all the decisions rendered by this court relative to the reciprocal immunity of federal and state governments from taxation by each other.

The recent cases which have somewhat narrowed the doctrine by refusing to grant the immunity to independent contractors dealing with

their respective governments are not controlling in the instant matter. See

*James* vs. *Dravo Contracting Co.*, 58 S. Ct. 208 (Dec. 6, 1937);
*Silas Mason* vs. *Tax. Comm.*, 58 S. Ct. 233 (Dec. 6, 1937);
*Helvering* vs. *Mountain Producers Corp.*, ---- U. S. ---- (March 7, 1938).

## II. NEITHER THE COLLECTOR OF INTERNAL REVENUE NOR THE EMPLOYEES OF THE STATE BELT RAILROAD ARE INDISPENSABLE PARTIES TO THIS PROCEEDING

This court has original jurisdiction of all cases in law and equity which involve controversies between a state and citizens of another state. (See Appendix to defendants' brief, quoting Article III, section 2, clauses 1 and 2 of the *Constitution of the United States.*)

In their brief defendants take the position that the Collector of Internal Revenue for the First District of California is an indispensable party to this proceeding and that the employees of the State of California operating the State Belt Railroad are likewise indispensable parties. The defendants further contend that, assuming that the employees and the collector are citizens of the State of California, they can not be joined as parties without ousting the jurisdiction of this court. We concede that the employees and the collector are citizens of the state and that the joinder of either the employees or the

collector would oust this court of jurisdiction. We maintain, however, that neither the collector nor the employees are indispensable parties to this suit.

In *California* vs. *Southern Pacific Co.*, 157 U. S. 229, this court noted that there are the following classes of parties to a bill in equity:

> "1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

### A. The Collector of Internal Revenue Is Not an Indispensable Party to This Proceeding

Section 319, R. S. (26 U. S. C. A. Sec. 1700) provides for the appointment of the Commissioner of Internal Revenue by the President by and with the advice and consent of the senate.

26 U. S. C. A. section 1701, provides:

"(a) The Commissioner under the direction of the Secretary,

(1) Shall have general superintendence of the assessment and collection of all duties and taxes imposed by any law providing internal revenue; and

(2) Shall prepare and distribute all the *instructions, regulations, directions,* forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue * * *." (Italics ours.)

With respect to these provisions, the Attorney General of the United States in 22 Op. Atty. General, 570, said:

"By this law the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, has the general *management, supervision* and *control* of the assessment and collection of internal revenue taxes. He has authority to give *instructions* and to make *regulations* such as may be necessary to carry out the general purpose of the law." (Italics ours.)

A regulation has the force of law.

*United States* vs. *Eliason,* 16 Pet. 291;
*Ex parte Reed,* 100 U. S. 13;
*Gratiot* vs. *United States,* 4 How. 80;
*Harvey* vs. *United States,* 3 Ct. of Claims 38.

Section 7 (a) of the Carriers' Taxing Act of 1937 provides:

"(a) The taxes imposed by this Act shall be collected by the Bureau of Internal Revenue and

shall be paid into the Treasury of the United States as internal revenue collections."

Section 7 (b) of said act provides:

"(b) The taxes imposed by this Act shall be collected and paid quarterly or at such other times and in such manner and under such conditions as may be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury * * *."

Section 12 of said act provides:

"The Commissioner of Internal Revenue * * * shall make and publish such rules and regulations as may be necessary for the enforcement of this Act."

The Commissioner of Internal Revenue not only has control and supervision over the collectors of internal revenue, but as provided by R. S. Sec. 3163 (26 U. S. C. A. Sec. 1732):

"Collectors may be suspended by the Commissioner for fraud, or gross neglect of duty, or abuse of power."

It is plain from these provisions of the general statutes, from the specific provisions of the Carriers' Taxing Act of 1937, and from the interpretation of the general law by the Attorney General of the United States that collectors of internal revenue, while under a duty to *collect* duties, act only under the supervision and direction of the Commissioner of Internal Revenue and in accordance with his regulations. If a collector does not follow such

directions and regulations, he may, in a proper case, be suspended by the commissioner for abuse of power.

We submit that defendants are in error in stating as they do on page 19 of their brief that the collector of internal revenue is "very differently situated from the subordinate officers sued in *Guerich* vs. *Rutter*, 265 U. S. 388, and *Webster* vs. *Fall*, 266 U. S. 507, where this court held that the suits could not proceed in the absence of the superior officers." The collector in the instant case bears a precisely similar relation to the commissioner as did the inferior officers to their superior officers in the cited cases.

As stated by the court in *Guerich* vs. *Rutter*, *supra*, referring to the National Prohibition Act and rules and regulations thereunder:

> "The act and the regulations make it plain that the prohibition commissioner and the prohibition director are mere agents and subordinates of the Commissioner of Internal Revenue. They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been made a party defendant—the principal one—and given opportunity to defend his direction and regulations."

The language used by the court with reference to the relation of the commissioner and his subordinates applies to the relations of the commissioner and the collector, with the single exception that the collector is not appointed by the commissioner. The relationship of superior and inferior is present, notwithstanding the method of appointment, and the power of control of the collector, as we have hereinabove shown, is vested in the commissioner.

We call the court's attention to the case of *Tait* vs. *Western Maryland Railway Co.*, 289 U. S 620, in which this court held that a judgment by the Board of Tax Appeals, approved by the circuit court of appeals, giving the right to a corporation to deduct from gross income an amortized proportion of the discount on sales of bonds by its predecessors, worked an estoppel against the United States and the Collector of Internal Revenue in later litigation between the collector and the corporation as to its right to make similar deductions for subsequent years under the same statutory provisions and Treasury regulations. The ground of this decision was stated in the following words of the court:

> "We think, however, that where a question has been adjudged as between a tax payer and the government or its official agent, the Commissioner, the Collector, being an ***official inferior in authority, and acting under them, is in such privity with them that he is estopped by the judgment.***" (Italics ours.)

For the reasons assigned in the *Tait* case the Collector of Internal Revenue for the First District of California would be estopped from collecting any tax from the State of California after a decision of this court enjoining the Commissioner of Internal Revenue from taking any steps to collect such tax. The collector therefore is not an indispensable party to this proceeding.

## B: The Employees of the State Belt Railroad Are Not Indispensable Parties in This Suit

In the determination of the class of party in a bill in equity, if any, to which a particular person belongs we must consider, first, the issues involved in the suit and, secondly, the effect upon such person of the determination of such issues.

It is the contention of complainant that the Railroad Retirement Acts of 1935 and 1937 and the Carriers' Taxing Act of 1937 are so interrelated and correlated that they in effect constitute one act having for its purpose the levying of an excise tax upon employers and an income tax upon employees to provide retirement benefits for railroad employees.

We call to the court's attention the case of *Alton Railroad Company* vs. *Railroad Retirement Board,* 16 Fed. Sup. 955, wherein the court in referring to the Railroad Retirement Act of 1935 (49 Stat. 967) and the Carriers' Taxing Act of 1935 (49 Stat. 974) said at page 956:

> "The two taken together so dovetail into one another as to create a complete system * * *.

The provisions of the two acts in question are so interrelated and interdependent that each is a necessary part of the entire scheme * * *. It was clearly the intention of Congress that the pension system created by the *Retirement Act should be supported by the taxes levied upon the carriers and upon employees.*"

At page 957, the court expressed itself as follows:

"* * * As was said by the Supreme Court in *United States* v. *Butler,* 297 U. S. 1, 61, 56 S. Ct. 312, 317, 80 L. Ed. 477, 102 A. L. R. 914: 'the exaction cannot be invested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all others than we can see and understand.' "

At page 958 the court continued:

"I think that from what has been said, it necessarily follows that the two acts are inseparable parts of a whole, that Congress would not have enacted one without the other * * *."

See also *United States* vs. *Butler,* 297 U. S. 1; *Railroad Retirement Board* vs. *Alton Railroad Company,* 295 U. S. 330.

In view of the similarity between the two acts discussed by the court in the *Alton Railroad* case, *supra,* and the acts in question herein, we submit that the discussion and the conclusions reached by the court relative to the nature and relationship of those acts are applicable and pertinent to the Railroad

Retirement Act of 1937 and the Carriers' Taxing Act of 1937. We submit that it was the intention of Congress in enacting the 1937 statutes that each employer and its respective employees should contribute the funds necessary to pay the benefits provided for those particular employees.

Inasmuch as the 1937 acts in question herein are to be considered as being in effect a single act, and inasmuch as it was the intention of congress that a particular employer and his employees are to provide the funds which are to be used for the retirement benefits accruing to those particular employees, and in consideration of the identical definitions of "employer" and "employee" in the two 1937 acts, and that there can not be an employer without a corresponding employee, if a particular carrier is not subject to the provisions of the Carriers' Taxing Act of 1937 it naturally follows, as an incident to the exclusion of the carrier, and as an incident only, that the employees of such carrier are not entitled to the benefits of the Railroad Retirement Acts of 1935 and 1937, and are not "employees" as defined in those acts.

The single issue in this suit, therefore, is whether the excise tax levied by the Carriers' Taxing Act of 1937 may be imposed upon the State of California as the operator of the State Belt Railroad. It seems clear to us that this question must be answered in the negative and that this court must conclude that the state as operator of said rail-

road is not within the purview of section 3a of the Carriers' Taxing Act of 1937.

It is a fundamental principle of statutory construction that where an act is susceptible of two interpretations, one which would require the court to declare the act unconstitutional, and the other which would uphold its constitutionality, a court will adopt that interpretation which will uphold the constitutionality of the act. If the court should conclude that the State of California in its operation of the State Belt Railroad is an employer within the purview of section 3a of the Carriers' Taxing Act of 1937, the act would be unconstitutional. (See Argument under Point I, *supra.*)

The employees of the State of California in its operation of the State Belt Railroad can not have any interest in the single issue presented to the court by the case at bar, and any effect upon such employees resulting from a determination by the court of that single issue arises incidentally by virtue of the court's conclusion as to whether the State of California is an employer within the meaning of section 3a of the Carriers' Taxing Act of 1937.

We submit, therefore, that such employees are not indispensable parties to this proceeding.

We have examined the cases cited by defendants in support of their theory that the employees are indispensable parties. In all of those cases the decision of the question before the court would

have a *direct* effect upon some property right of the absentees.

In *California* vs. *Southern Pacific Co.*, 157 U. S. 229, the matter in controversy was the ownership of certain tide lands, the title to which California was seeking to quiet as against the defendant. The city of Oakland and the Waterfront Company were grantees of certain similarly located lands, and their rights to those lands would be directly affected by the decision of the court.

In *Minnesota* vs. *Northern Securities Co.*, 184 U. S. 199, the absentee parties were two railroad companies whose functioning would be directly affected by the decree of the court; also the property of the stockholders of these companies would be directly affected by the decision.

In *New Mexico* vs. *Lane*, 243 U. S. 158, the absentee was the purchaser from the United States Government of the land involved in the controversy. Upon the decision of the court depended his property right in the land.

In all three of these cases, property rights of parties not joined would be directly affected by the decision of the court. This is a very different situation from the instant case, where the decision of the court on the main point in issue, to wit, the power of the federal government to tax a state, could not possibly affect any property right of any of the employees of the State Belt Railroad.

In *Texas* vs. *Interstate Com. Commission*, 258

U. S. 158, the controversy involved the validity of a federal statute authorizing the Labor Board to regulate working conditions and wages of employees of railroads engaged in interstate commerce. Before the action was brought the board had adjusted these matters and its orders had gone into effect. The decision of the court would have had a direct effect upon the wages and working conditions of the employees. That action is also readily distinguishable from the case at bar. Here a decision that the state is not taxable would not *directly* affect any right or privilege of the employees. The only effect upon them would be the failure of the Railroad Retirement Acts to operate. This would be a consequential and not a direct effect.

In *Barney* vs. *Baltimore,* 6 Wall. 280, there was a suit for partition of real estate in which certain persons who were part owners were not joined.

In *New Orleans Water Works* vs. *New Orleans,* 164 U. S. 471, an injunction was sought against the city of New Orleans to prevent the city from granting rights to any person other than complainant to conduct water through pipes in the city, the complainant claiming an exclusive privilege in this respect. The complaint alleged that the city had granted such privileges to other persons who were not joined as parties to the action.

In each of the cases which we have discussed above and upon which the defendants base their claim that the employees are indispensable parties,

we note that the absentee parties were primarily interested, and in fact in the case of *Texas* vs. *Interstate Commerce Commission, supra,* were the only parties interested, in the single issue presented to the court, whereas in the case at bar the employees of the State of California in the operation of the State Belt Railroad do not and can not have any interest in nor are they directly affected by any determination which this court may make on the single issue before the court, to wit, whether the excise tax imposed by the Carriers' Taxing Act of 1937 applies to the State of California in the operation of the State Belt Railroad.

## III. THE BILL OF COMPLAINT STATES A CASE CALLING FOR THE INTERPOSITION OF A COURT OF EQUITY

In Point III, pages 25-37 of their brief, defendants make a labored effort to show that the bill of complaint herein is without equity, contending that:

(1) Complainant will suffer no injury, irreparable or even substantial, and

(2) Complainant has an adequate and complete remedy at law.

On pages 25, 26 and 27 of their brief defendants state that the only actions taken by defendants relative to the enforcement against complainant of the Railroad Retirement Act of 1937 and the Carriers' Taxing Act of 1937 are the letters of the Gen-

eral Counsel of the Railroad Retirement Board and the Commissioner of Internal Revenue set forth on pages 34-37 of the bill. We think it is not inappropriate, however, to state that on March 25, 1938, about the time the bill of complaint was being printed, a "Second Notice and Demand for Tax" was made upon the State of California operating the State Belt Railroad by the Collector of Internal Revenue for taxes in the amount of $12,685.36, alleged to be due from the state under the Carriers' Taxing Act of 1937 for the period ending September 30, 1937, and for taxes in the amount of $4,170.54 alleged to be due from the state under the same act for the period ending December 31, 1937. Both of these demands stated:

> "If payment of the tax, penalty, and interest is not received within 10 days after the above date," (March 25, 1938) "collection with costs shall be made by *seizure and sale of property.*" (Italics ours.)

It must be assumed that the collector, in making this demand, acted under instructions of defendant Guy T. Helvering, Commissioner of Internal Revenue. (See 26 U. S. C. A. Sec. 1701, hereinabove quoted under our Point II-A.)

We call the court's attention to Exhibit "B" attached to the bill of complaint, which shows that a copy thereof was sent to the Collector of Internal Revenue at San Francisco and that he was acting

under and pursuant to the directions of the commissioner.

So much for the action and threatened action taken by the defendants.

### A. Complainant Is Exposed to Irreparable Injury From the Action and Threatened Action of the Railroad Retirement Board and Has a Right to Resort to a Court of Equity to Prevent the Same, Notwithstanding the Provisions of Section 3224, Revised Statutes

Before discussing the injury, actual and threatened, incurred by the state by reason of the action and threatened action of defendants, we shall discuss some general principles relating to the right of complainant herein to resort to a court of equity in this case.

At the outset we will say that the complaint in this case is quite similar in its allegations to the complaint in *Alton Railroad Co.* vs. *Railroad Retirement Board,* 16 Fed. Supp. 955, particularly in its allegations of grounds for equitable relief. The court said at page 959:

> "The defendants have moved to dismiss both the bill and the intervening petition upon the ground that equity has no jurisdiction, relying upon R. S. 3224 (26 U. S. C. A. Sec. 1543).
>
> * * * * *
>
> "The Supreme Court has held where the remedy at law is sufficient the act controls but that 'in cases where complainant shows that in addition to the illegality of an exaction in the

guise of a tax there exist *special* and *extraordinary circumstances* sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the Collector'. *Miller* v. *Standard Nut Margarine Company,* 284 U. S. 498, 52 S. St. 260, 263, 76 L. Ed. 422.

"I think the case at bar presents extraordinary circumstances, rendering relief in equity necessary. It is clear that if the tax be illegal, the carriers will suffer irreparable loss. There will be serious disruption between the carriers and their employees. Many employees will have relinquished their employment with the carriers within the next year *upon the assumption of the permanency of their annuities* provided for in the Retirement Act, *and their positions will be filled by others.* Rate adjustments may depend upon the validity of the tax. Reorganization plans will be delayed. Great accounting expense will be imposed upon the carriers, and this will be necessary from the fact that exact records are available only in the offices of the carriers. * * * For these reasons I think that equity has jurisdiction of this suit."

Turning now to the allegations of the bill of complaint as to grounds for equitable relief, we direct the court's attention to Paragraph VI, pages 15-17. On page 25 of the bill it is alleged that an early determination of the applicability of the Retirement Act of 1937 and the Carriers' Taxing Act of 1937 will prevent complainant from suffering irreparable damage which would otherwise result in case said

acts are later determined by the courts to have no application to complainant. Such irreparable loss to complainant would result

> "from multiplicity of claims and suits by the employees of said State Belt Railroad to establish their rights to civil service status under the laws of the State of California, and their rights and privileges under the State Employees Retirement System of said state, which rights and privileges will have been surrendered by them in reliance upon the Railroad Retirement Act of 1937."

The situation pictured by these allegations, briefly expressed, is this: The state as employer, in advance of a determination by this court, does not know whether its employes are subject to the State Retirement System or to the Federal Railroad Retirement System. Should the state, purporting to act as an employer, rely upon the provisions of the Railroad Retirement Acts of 1935 and 1937 and the Carriers' Taxing Act of 1937, and the Railroad Retirement Act of 1937 later be found not to apply to the State Belt Railroad, the state will be exposed to a multiplicity of claims and suits by these employees seeking to be restored to their rights and privileges under the state system.

It is difficult to conjure up a situation where there could exist more "special and extraordinary circumstances" justifying a recourse to a court of equity for relief.

On pages 27-29 of the bill of complaint it is alleged that the provisions of the Carriers' Taxing Act of

1937 and of the Railroad Retirement Act of 1937, if enforced against the State of California operating the State Belt Railroad, will cause the state to incur great expenses:

(1) On account of the necessity for deducting taxes from the compensation of the employee "as and when paid";

(2) On account of the calculations required to determine the average compensation earned by an employee in calendar months included in his years of service in the years 1924-1931; and

(3) On account of the necessity for determining a just and equitable basis for monthly compensation for the service period prior to January 1, 1937.

Heretofore there has been no necessity for any such accounting system. While it is impossible to state with any degree of accuracy the additional labor and expenses to which the state will be put in keeping additional records and making additional computations as hereinabove described, it is evident that all such expense will be irrecoverable in case the Carriers' Taxing Act of 1937 and the Railroad Retirement Act of 1937 shall later be found not to apply to the state. Clearly, therefore, the state will, in such case, suffer irreparable injury.

On page 28 of the bill of complaint it is also alleged that if the Railroad Retirement Act of 1937 and the Carriers' Taxing Act of 1937 are enforced against the state, additional records will have to be gathered and kept by the state in order to supply data to the

Railroad Retirement Board which will be necessary to enable that board to arrive at the amount of annuity to which the employees of the State Belt Railroad may be entitled.

Here, again, it is impossible to estimate the amount of labor or the cost which will be entailed by reason of the keeping of these additional records. It is obvious that records must be kept which have heretofore been entirely unnecssary and uncalled for. This expense also, if the above named acts should be found not applicable to the state can not be recovered and will cause the state irreparable injury.

We submit that the defendants have no basis for the contention made on pages 30-32 that the cost and effort of instituting and keeping these accounts would be negligible.

With respect to the necessity of keeping these additional accounts and records with no prespect of reimbursement therefor, it may also be said that these are "special and extraordinary circumstances justifying a recourse to equity for relief."

On pages 28, 29 and 30 of their brief defendants attempt to answer the allegation contained in Paragraph IX of the complaint that the defendant members of the Railroad Retirement Board have threatened to and unless enjoined by this court will require the complainant, through the Board of State Harbor Commissioners for San Francisco Harbor, to gather and keep the aforesaid records of the employees of complainant on said State Belt Rail-

road and will enforce against complainant certain penalties.

In answer, defendants contend that the Railroad Retirement Board is not authorized to prosecute criminal actions against the complainant for its failure to keep records and in support thereof cite the case of *Federal Trade Commission* vs. *Claire Furnace Company,* 274 U. S. 160, which case turned upon a provision of a statute which expressly authorized the Attorney General of the United States to enforce the criminal provisions of the act involved therein when requested to do so by the commission. However this may be, we call the court's attention to section 10 (b) 4 of the Railroad Retirement Act of 1937 which specifically authorizes a suit by the Railroad Retirement Board to compel obedience to any order of the board issued pursuant to said section. Under this authorization the Railroad Retirement Board undoubtedly has the power to bring an action in the United States district court directly against complainant to compel it to keep and produce records upon the order of that board. The contention of defendants that in case such suit is brought complainant could set up as a defense any ground which it is now urging upon this court as a basis for equitable relief is not well founded when we consider all the other bases for the exercise of original juridiction in equity which we have alleged hereinabove.

**B. The Threat of the Commissioner of Internal Revenue and of His Subordinate, the Collector of Internal Revenue, to Collect Taxes From the Complainant and to Seize and Sell Its Property Exposes Complainant to Irreparable Injury. Complainant Has No Adequate Legal Remedy Through Payment of Taxes and a Suit for Refund, or Otherwise. Section 3224, Revised Statutes, Is Not Applicable Herein**

In answer to defendants' contention on page 33 of their brief that the power to collect taxes is vested in the Collector of Internal Revenue for the First District of California, we refer to Point II-A of this brief, in which we have made it clear that the collector acts under the control and supervision of the commissioner and it must be considered that his acts are the acts of the commissioner. True it is that complainant could avoid penalties by paying the tax and suing for a refund. It is not true, however, that this court is without jurisdiction to enjoin the collection of the tax in question, for as we have hereinabove shown in Subdivision A of Point III, there are "special and extraordinary circumstances" from which it appears that payment and suit for a refund would irreparably injure the state.

The argument made on pages 34 and 35 of defendant's brief is not an answer to our claim that the state would suffer irreparable injury by the delay which would ensue upon payment of the tax

and suit for refund, since any suit at law for a refund could not possibly be decided within the time that would be required for determination of this original proceeding in this court, and in such an action for refund all of the relief prayed for in this proceeding in equity against both the Commissioner of Internal Revenue and the members of the Railroad Retirement Board could not possibly be obtained. As we have hereinabove shown, this additional relief is justified by "special and extraordinary circumstances justifying a recourse to equity for relief" which take this case out of the application of section 3224, Revised Statutes.

*Alton Railroad Co.* vs. *Railroad Retirement* 16 Fed. Supp. 955;
*Miller* vs. *Standard Nut Margarine Company,* 284 U. S. 498, 52 S. Ct. 260, 263, 76 L. Ed. 422.

On pages 35-37 of their brief defendants argue that the imposition upon the state and the State Belt Railroad of an income tax in the yearly amount alleged in the complaint, to wit, $7,862.32, will not be a burden upon the state and the Harbor of San Francisco inasmuch as this amount is not in excess of the amount heretofore paid by the state under the State Employees' Retirement Act. The substantial equivalence of the amounts of these two kinds of contributions is admitted. Nevertheless, the proposed tax is none the less a burden upon the State of California and upon San Fran-

cisco Harbor. It is one thing for the state voluntarily to assume a burden; it is quite another to have a burden thrust upon it.

Furthermore, prior to a determination by some court as to the applicable system to the complainant, common prudence requires the state to set aside sufficient amounts to protect both the state and its employees under both systems.

We make no separate answer to Paragraph IV of defendants' brief wherein they contend that this suit is prohibited by section 3224 of the Revised Statutes, as we have fully answered this argument under Point III-B.

Therefore we submit that this court may exercise its equitable jurisdiction.

## IV. THIS IS NOT A SUIT AGAINST THE UNITED STATES BECAUSE THE UNITED STATES IS NOT THE REAL DEFENDANT

On pages 41-46 of their brief it is argued by defendants that the case at bar is not maintainable in this court because the United States is the real defendant and it may not be sued without its consent, even by a state.

In support of this contention the defendants cite at page 41 of their brief numerous cases which support one or the other of the two following principles:

(a) The United States is the real defendant and can not be sued without its consent if a deter-

mination of the issue presented will affect property the title to which is in the United States.

*Morrison* vs. *Work,* 266 U. S. 481;
*New Mexico* vs. *Lane,* 243 U. S. 52;
*Oregon* vs. *Hitchcock,* 202 U. S. 60;
*Minnesota* vs. *Hitchcock,* 185 U. S. 373;
*Cummings* vs. *Deutsche Bank,* 300 U. S. 115;
*Louisiana* vs. *Garfield,* 211 U. S. 70.

(b) The United States is the real defendant and can not be sued without its consent if an action is commenced against an officer acting pursuant to a constitutional statute, who is not acting in excess or abuse of his power.

*Lambert Co.* vs. *Baltimore & Ohio Railroad Co.,* 258 U. S. 377, 382;
*Texas* vs. *Interstate Com. Comm.,* 258 U. S. 158;
*North Dakota* vs. *Chicago & N. W. Ry. Co.,* 257 U. S. 485;
*Wells* vs. *Roper,* 246 U. S. 335;
*Louisiana* vs. *McAdoo,* 234 U. S. 627;
*Kansas* vs. *Colorado,* 185 U. S. 125.

We have included in neither of these classifications the following cases for the reason that although the question of the right to sue the United States was raised by counsel in these cases, the decision in each case rested upon other grounds:

*Arizona* vs. *California,* 283 U. S. 423;
*Massachusetts* vs. *Mellon,* 262 U. S. 447.

Conceding the correctness of the two principles which the defendants rely upon, nevertheless we call

the court's attention to a further principle which we feel is controlling under the circumstances of the present case, to wit: It is a settled doctrine that a suit against individuals purporting to act as officers of a government, for the purpose of preventing them as such officers from enforcing an unconstitutional enactment to the injury of the rights of a party plaintiff, is not a suit against that government.

*Poindexter* vs. *Greenhow,* 114 U. S. 270, 330, 5 S. Ct. 903, 962, 29 L. Ed. 185, 207;
*Atchison, T. & S. F. R. Co.* vs. *O'Connor,* 223 U. S. 280, 32 S. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913 C, 1050;
*Reagan* vs. *Farmers' L. & T. Co.,* 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014;
*Smyth* vs. *Ames,* 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819;
*Haskins Bros. & Co.* vs. *Morgenthau,* 85 Fed. (2d) 677, 683, 684;
*Philadelphia Co.* vs. *Stimson,* 223 U. S. 605;
*Goltra* vs. *Weeks,* 271 U. S. 536.

Under Point I, *supra,* we feel that we have established that the State of California is not subject to the Carriers' Taxing Act of 1937 and to so hold would render that act unconstitutional. We call the court's attention to the allegations found in Paragraph VIII of the bill of complaint, wherein we have alleged that to so construe the act would render the same unconstitutional. Further, we call the court's attention to the various allegations in Paragraphs

IX, X and XI of the bill of complaint relative to the threats and actions taken by the defendants herein, which threats and actions have purportedly been made and done by the defendants in their official capacities. We expressly call the court's attention to the threat made on March 25, 1938, by the Collector of Internal Revenue, acting pursuant to directions issued by the Commissioner of Internal Revenue, to seize and sell property of the complainant to effect collection of the taxes alleged to be due from complainant herein.

We submit that the aforesaid threats and action or any action which any of the defendants may hereafter take pursuant to their announced intention to enforce the aforesaid acts against complainant pursuant to the unconstitutional (if applied to complainant herein) Carriers' Taxing Act of 1937 is not an action by those defendants in their official capacities and is not an action of the United States, but is merely an action taken by said defendants in their personal capacities. Furthermore, we submit that the United States is not the real defendant in this action.

## CONCLUSION

For the reasons hereinabove in this brief assigned, it is respectfully submitted that the motion of complainant for leave to file bill of complaint herein should be granted; that the defendants should be required to appear and answer the bill of complaint;

and that complainant should be granted the relief prayed for in said bill of complaint.

Respectfully submitted.

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